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 MICHAEL KANALAKIS

**IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA**

JIMMY HAWS, SETH DANIEL HAWS,
 and MIA SKYE HAWS, minors, by and
 through their guardian ad litem, CARRIE A.
 HAWS, and CARRIE A. HAWS,
 individually,

Plaintiffs,

v.

COUNTY OF MONTEREY, MICHAEL
 KANALAKIS, NATIVIDAD MEDICAL
 CENTER and DOES 1-300, inclusive,

Defendants.

Case No. C 07-02599 JF

MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 DEFENDANTS COUNTY OF MONTEREY
 AND MICHAEL KANALAKIS' MOTION
 TO DISMISS PLAINTIFFS' FIRST
 AMENDED COMPLAINT WITH
 PREJUDICE [F.R.C.P. 12(b)(6)]

Date: November 2, 2007
 Time: 9:00 AM
 Ctrm.: 3, 5th Floor
 Judge: Hon. Jeremy Fogel
 Action Filed: May 16, 2007

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS.

On December 7, 2006, Jimmy Haws was a pretrial detainee in the custody of the Monterey County Sheriff's Office and was housed in the Monterey County Jail. On the morning of December 7th, Jimmy Haws and his cellmate, Roger Spencer, were released from their cell into a common area of the jail for their one hour of "free" time. During this time, Haws and Spencer got into a physical altercation. At one point, Spencer placed Haws in a choke hold while they were at the top of a flight of stairs. The choke hold apparently caused Haws to lose consciousness. Spencer then released his hold on Haws and

1 caused Haws to fall down the flight of stairs. The fall caused Haws to strike his head. Haws was
 2 transported to Natividad Medical Center and subsequently was transferred to the Community Hospital of
 3 the Monterey Peninsula (CHOMP) where he underwent surgery for his head injuries. Currently, Haws is
 4 in a long-term care facility undergoing rehabilitation and recovery.

5 Plaintiffs filed their complaint against Defendants County of Monterey, Michael Kanalakakis and
 6 Natividad Medical Center on May 16, 2007, alleging seven causes of action. These moving defendants
 7 filed a Motion to Dismiss Plaintiffs' Complaint on June 12, 2007. On July 20, 2007, the hearing was
 8 held on Defendants' motion. Subsequently, on July 27, 2007, the Honorable Jeremy Fogel issued his
 9 Order granting in part and denying in part Defendants' Motion to Dismiss. On August 15, 2007,
 10 Plaintiffs' filed their First Amended Complaint (FAC). The FAC contains six causes of action, three of
 11 which are alleged exclusively against DOE defendants.

12 II.

13 STANDARD OF REVIEW TO BE USED IN 12(b)(6) MOTIONS.

14 The Defendants' motion seeks dismissal of Plaintiff's FAC pursuant to F.R.C.P., Rule 12(b)(6).
 15 In adjudicating 12(b)(6) motions, it is true that the court must generally accept the allegations contained
 16 in the plaintiffs' pleading as true. But when the pleading contains unwarranted deductions of fact or
 17 unreasonable inferences, they need not be accepted. *In re Delorean Motor Co.* 991 F.2d 1236, 1240 (6th
 18 Cir. 1993); *Taylor v. F.D.I.C.*, 132 F. 3d 753, 762 (DC Cir. 1997); *Transphase Systems, Inc. v. Southern*
 19 *Calif. Edison Co.* 839 F. Supp. 711, 718 (CD CA 1993) (quoting text); *Beliveau v. Caras*, 873 F. Supp.
 20 1393, 1395-1396 (CD CA 1995) (citing text).

21 III.

22 PLAINTIFFS FAC AGAIN FAILS TO ASSERT AN INDEPENDENT CLAIM UNDER THE 23 FOURTEENTH AMENDMENT FOR THEIR ALLEGED LOSS OF CONSORTIUM AND 24 INSTEAD ASSERTS THE LOSS OF CONSORTIUM ONLY AS A BASIS FOR DAMAGES. 25 THIS IS CONTRARY TO THE COURT'S ORDER OF JULY 27, 2007.

26 The sole basis for this Motion to Dismiss is Plaintiffs' continued failure to assert their loss of
 27 consortium allegations as an independent cause of action. Plaintiffs have again asserted the loss of
 28 consortium allegations only as a basis for damages in the FAC. These moving defendants asserted this
 same basis in their initial Motion to Dismiss Plaintiffs' Complaint. In Judge Fogel's Order dated July

27, 2007, in which he granted in part and denied in part Defendants' Motion to Dismiss, Judge Fogel, at page 5 of his order in the second full paragraph on that page, states that Plaintiff's original complaint only "includes loss of consortium as a basis for damages, not as an independent claim under the Fourteenth Amendment". After going on to state that the complaint alleges limited facts to support a loss of consortium claim and that "the Complaint does not provide sufficient facts tending to show that Haws' family members have standing to bring a claim under section 1983" the court states, "Any amended claim should address these inadequacies". The Order also stated in footnote 8 that its analysis also applied to Plaintiff's claims that are asserted only against DOE defendants. Plaintiffs have failed to follow the Court's order specifically as to their loss of consortium claims to assert an independent claim under the Fourteenth Amendment.

For the reasons stated above, Defendants request that the court dismiss Plaintiffs' FAC. Further, since Plaintiffs have now had two opportunities to state a claim for loss of consortium and have failed to follow the Court's explicit order in regards to the loss of consortium assertions, the Court should dismiss the FAC without leave to amend as to any loss of consortium claims.

CONCLUSION.

For Plaintiff's failure to follow the court's explicit order as it specifically pertains to Plaintiff's loss of consortium assertions, the court should dismiss Plaintiff's FAC with prejudice specifically as to any future loss of consortium claims.

DATED: September 4, 2007.

Respectfully submitted,

CHARLES J. McKEE, County Counsel

By /S/ Traci A. Kirkbride
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Attorneys for Defendants COUNTY OF MONTEREY
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